No. 99-1792

In the
SUPREME COURT OF THE UNITED STATES

DIRECTOR OF REVENUE,

Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

REPLY BRIEF FOR PETITIONER

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON
State Solicitor
Counsel of Record
Jefferson City, MO 65102
(573) 751-3321
Counsel for Petitioner

ARGUMENT

1. According to CoBank, the conflict between the Missouri and New Mexico decisions is merely as to the proper interpretation of the language in 12 U.S.C. §§ 2077 and 2134. Thus CoBank points to the absence of any discussion in the New Mexico appellate briefs of the legislative history of the 1985 amendments. That argument ignores the deeper and broader-reaching conflict discussed in the petition.

Under the Missouri court's reading of this Court's precedents, CoBank's citation to the legislative history is irrelevant. The question, in Missouri, is not what Congress *intended to do*, but merely what Congress *said in the statute*. Thus the Missouri court did not have to look in the legislative history -- or even in logic -- to explain why Congress would abruptly move from having production credit associations and banks for cooperatives pay all state and local taxes, to having them pay none.

CoBank might have a better argument that legislative history was relevant under the rule applied by the New Mexico court. Under that rule, the court can look beyond the mere words of the statute. But the absence of a discussion of legislative history in the New Mexico decision cannot be attributed just to the scope of the parties' briefs and arguments. The New Mexico court held that rules of statutory construction can be used to determine whether Congress has authorized taxation -- not that the standards for tax immunity waivers set by this Court could be met through language in a congressional committee's report.

Again, it is in the ability of the courts to resort to rules of construction that the Missouri and New Mexico courts differ. They agree that as to the imposition of state

and local taxes, the language now found in § 2134 is silent. And though they "agreed that Congress must affirmatively authorize states to tax federal instrumentalities" such as CoBank (Brief in Opposition at 13), the courts' differing conclusions as to whether Congress can "affirmatively authorize" taxation by replacing an express waiver of immunity with silence cannot be reconciled. CoBank does not even try.

2. Even if the legislative history of the 1985 amendment were relevant, it is not so "clear" as CoBank suggests. The committee report they cite speaks of "technical and conforming" changes, without identifying which change falls into which category -- and certainly without intimating that any of the changes are independently significant, as an end to state and local taxation of production credit associations and banks for cooperatives would certainly be. The tie CoBank asserts between a particular phrase in the report and a particular line in the bill is CoBank's invention; it is neither apparent in nor compelled by the language of the report. Notably, CoBank fails to provide any explanation either for the broad change it argues that Congress made, or for hiding it in a list of "technical and conforming" amendments.

We do not know why CoBank omitted such an explanation from its brief in opposition. But the reason for its omission from briefs and arguments to the Missouri Supreme Court is apparent: CoBank argued that the court need look no further than the express language of the statute to define the scope of tax immunity, thus making an explanation unnecessary and irrelevant. The Missouri court accepted that argument; the New Mexico court rejected it.

3. CoBank closes by asserting that the dispute between the New Mexico and Missouri decisions has limited impact. That argument ignores three points. First, CoBank (like

production credit associations) operates in all fifty states and competes with other financial institutions, both federally and state-chartered, that do not share the immunity it claims. Second, the holdings in Missouri and New Mexico will be applied to other taxes; if there remains a basis, under the Missouri holding, for states to impose other taxes, it is not evident in CoBank's argument. And third, the difference between the Missouri court's holding (affirmative authorization only by express language) and the New Mexico court's holding (affirmative authorization through statutory construction) has implications for all federal instrumentalities, not just for these two elements of the Farm Credit System.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition and resolve the conflict as to whether Congress, by repealing merely a portion of a federal instrumentality's express exemption from tax, expands that exemption.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

James R. Layton
State Solicitor
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner